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MEMORANDUM OF LAW

DATE: December 23, 1996

NAME: Larry Monserate, Principal Planner, Development Services

FROM: City Attorney

SUBJECT: Determination of City's Right to Use the Old Pomerado Road

QUESTION PRESENTED

Is the City legally entitled to use a portion of the old Pomerado Road in connection with the construction of a pump station for Miramar Ranch North?

SHORT ANSWER

The City may legally use the portion of the old Pomerado Road in question for the Pomerado Pump Station and may construct necessary connector lines from the 16" water line running under the old Pomerado Road to the pump station.

BACKGROUND FACTS

You have advised us that, as a requirement of the development of Scripps Ranch Villages (aka Miramar Ranch North), a pump station must be constructed. The Water Utilities Department has chosen a site it deems suitable located in the roadbed of the old Pomerado Road.

According to an exhibit submitted by McMillan Scripps, Inc., the pump station is proposed on a portion of the roadbed for which the City was granted an 80-foot easement in 1965 from the United States of America for road and utility purposes (the "USA Easement"). Ingress and egress to the pump station and water lines connecting to the pump station will run over and

under adjacent land to the north of the USA Easement. This land to the north of the USA Easement was the subject of a recorded agreement for grant of an easement for road purposes made in 1920 (the "Scripps Easement").

Title records indicate that the Scripps Easement was the subject of an agreement between E.W. Scripps and the County of San Diego for dedication of an easement for roadway purposes for Mission Road 1-A, upon enumerated conditions, including construction of the roadway by the County. The roadway was constructed and later became State Highway 395 and was finally annexed into the City of San Diego as Pomerado Road. However, the grant of easement was never recorded.

ANALYSIS

There is no question about the construction of the pump station on the USA Easement. This easement is expressly reserved for road and utility purposes. Thus the pump station, a "utility" facility, is consistent with the easement. As to the Scripps Easement, we believe that a dedicated easement for road purposes exists and that the construction of the water lines and the use for ingress and egress is consistent with the easement.

A dedication at common law may be completed where there is evidence of an intent to dedicate and evidence that the agency accepted the dedication. McQuillin Mun. Corp. section 33.02 (3rd Ed.) citing *Ackley v. San Francisco*, 11 Cal.App.3d 110 (1970) and *McGinn v. State Board of Harbor Com'rs*, 113 Cal.App. 695 (1931). Courts in California have consistently recognized the effectiveness of a common law dedication where the dedication is implied from the facts, including continued public use of the easement for a period of time. *See, e.g., Bess v. City of Humboldt*, 3 Cal.App.4th 1544 (1992) (dedication based upon public's use as a public road) and *Kitzman v. Newman*, 230 Cal.App.2d 715 (1964) (applying law of dedication to sidewalk constructed by private property owner so as to become part of public route for 6 ½ years). Where, as here, the evidence is contained in the agreement recorded on the property title, and the County constructed the road, which was then used by the public for a number of years, we believe case law supports the conclusion that a dedication was completed. Therefore, we believe the City may use the dedicated property consistent with the purpose for which it was dedicated.

Land dedicated for a street or alley may be used just as a street acquired in any other manner may be used, for example, the construction of sewers. McQuillin Mun. Corp. Section 33.74 (3rd Ed.). In *Hayes v. Handley*, 182 Cal.274 (1920) the California Supreme Court held that construction of a pedestrian traffic tunnel in a city street was a use to which the street could be put without additional compensation. *See also Fallon v. City and County of San Francisco*, 44 Cal.App.2d 404 (1941) (finding that abutting property owners right to use of ground under street easement was subject to the paramount right of the public to make any reasonable use of such area). Therefore, the construction of the water lines to and from the pump station to the

water line currently running under the old Pomerado roadbed is consistent with the dedicated easement. Likewise, use of the roadway for ingress and egress to the pump station is consistent with the easement.

CONCLUSION

The property on which the pump station and connecting lines is proposed for construction is subject to two easements, one for roadway purposes and one for road and utility purposes. The City may use the old Pomerado roadbed for the construction of the pump station, "utility purposes," and connecting lines, as an incidental "street purpose".

CASEY GWINN, City Attorney

By

Prescilla Dugard
Deputy City Attorney

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